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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 256

J. THOMAS MILEY,
*Petitioner,*

*v.*

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY ET ALS.,
*Respondents.*

## BRIEF FOR RESPONDENTS MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY AND JOHN HILL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1955

No. 1156

J. THOMAS MILEY, PETITIONER,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, BOSTON MUTUAL LIFE INSURANCE COMPANY, COLUMBIAN NATIONAL LIFE INSURANCE COMPANY, LOYAL PROTECTIVE LIFE INSURANCE COMPANY, MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY, STATE MUTUAL LIFE ASSURANCE COMPANY OF WORCESTER, CLARENCE W. WYATT, EDWARD A. GREEN, ALAN R. WILLISON, JOHN HILL, THEODORE W. FABISAK, JOSEPH A. HUMPHREYS, JOHN M. DEELY, HORACE GOOCH, JR., AND CARL A. SHERIDAN,

RESPONDENTS.

## BRIEF FOR RESPONDENTS MONARCH LIFE INSURANCE COMPANY, NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, PAUL REVERE LIFE INSURANCE COMPANY AND JOHN HILL IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## Statutes Involved

The statutes involved in this case are set forth in relevant part in the Appendix to this brief. They are:

Sherman Anti-Trust Act, 15 U.S.C. § 1 (1952)
Clayton Act, 15 U.S.C. § 15 (1952)
McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1014 (1952)
Massachusetts General Laws (Ter. Ed.) c. 32A, §§ 3, 4
Massachusetts General Laws (Ter. Ed.) c. 176D, §§ 1, 2, 3, 5, 9, 12.

## Questions Presented

1. Was the Sherman Act inapplicable to the plaintiff's claim in view of the fact that:

a. The conduct complained of was the negotiation and purchase of an insurance contract by the Commonwealth of Massachusetts from Massachusetts insurance companies for the benefit of state employees,

b. The McCarran-Ferguson Act exempts the business of insurance from the Sherman Act "to the extent that such business is . . . regulated by State law," and

c. The Commonwealth of Massachusetts has established a comprehensive statutory scheme for the regulation of all phases of the insurance business and enacted a statute specifically directing and regulating the negotiation of the contract for its employees?"

2. Was the injury alleged by the plaintiff so indirect, remote and speculative as to bar recovery under the Sherman Act?

## Statement of the Case

Because the petitioner's statement of the case is both misleading and argumentative throughout, there is set forth below a concise statement of the facts which are material to the consideration of the questions presented.

This is an action begun in the United States District Court for the District of Massachusetts in which the plaintiff, an insurance broker, claimed that the several defendants—eight insurance companies, four insurance company officers and the five members of the State Employees' Group Insurance Commission of Massachusetts—engaged in a conspiracy in violation of the Sherman Anti-Trust Act to the injury of the plaintiff.

The complaint alleged that by Mass. St. 1955, c. 628, [Mass. G.L. (Ter. Ed.) c. 32A] provision was made for the establishment of group insurance coverage for state employees, the insurance contract to be negotiated and executed by the State Employees' Group Insurance Commission, an agency which was established by said statute and which was given the responsibility for the administration and supervision of the insurance (A. 9). The defendants Fabisak, Humphreys, Deely, Gooch and Sheridan are members of the Commission (A. 8, 9).

The Commission was directed by section 4 of Mass. G.L. c. 32A to

> "... negotiate with and purchase ... such terms as it deems to be in the best interests of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations, a policy or policies of group life and accidental death and dismemberment insurance covering persons in the service of the commonwealth.

and group general or blanket insurance providing hospital, surgical and medical benefits covering persons in the service of the commonwealth and their dependents, and shall execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth. Said commission may negotiate a contract for such term not exceeding three years as it may in its discretion deem to be the most advantageous to the commonwealth; provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then current fiscal year."

The Commission was also directed to "adopt such reasonable rules and regulations as may be necessary for the administration of this act." Mass. G.L. c. 32A, 3.

In November, 1955, the Commission made available to insurance companies and brokers "An Invitation to All Insurance Companies Licensed To Do Business in Massachusetts" which invited the submission of proposals as set out in the publication, the proposals to be submitted on or before December 1, 1955 (A. 10).

The complaint further alleged that Miley submitted a proposal on behalf of Blue Cross, Blue Shield and Minnesota Mutual Life Insurance Company, a Minnesota corporation (A. 10, 11). Under Miley's proposal, Minnesota Mutual was to provide the life and accidental death and dismemberment coverage for the state employees' policy (A. 11). The premium cost of that coverage was lower than that set forth in any of the proposals submitted by other companies prior to December 1, 1955, including a proposal submitted jointly by all of the defendant Mas-

sachusetts companies except Boston Mutual Life Insurance Company (A. 12).

The complaint averred that after the Commission had determined that the life and accidental death and dismemberment premium suggested in the Miley proposal was the lowest submitted, the members of the Commission met with representatives of the defendant companies, including the officers who are defendants here, and undertook to devise some method by which the Massachusetts companies might reduce their premium to that proposed by Minnesota Mutual (A. 12, 13). The plaintiff alleged that this undertaking by the Commission and the representatives of the Massachusetts companies was "part of the conspiracy to eliminate MINNESOTA as a competitor and discourage it from continuing to solicit business in Massachusetts" (A. 14, 15). There was no allegation that the contract obtained by the Commission was not in fact in the best interests of the Commonwealth, or that the Commission did not "deem it to be" so. Mass. G.L. c. 32A, § 4.

As the complaint stated, the Massachusetts companies through the cooperation and assistance of the defendant Boston Mutual Life Insurance Company were able to reduce their premium for the life and accidental death and dismemberment coverage to the figure proposed by Minnesota Mutual, and the contract provided for by Mass. St. 1955, c. 628 was executed by the Commission with Boston Mutual which reinsured 95% of the insurance with the other defendant Massachusetts companies (A. 16-18). The plaintiff claimed that this contract was illegal and void, and that the Commission should have entered into a contract with Minnesota Mutual (A. 18).

Minnesota Mutual was not a party to this action. However, the plaintiff alleged that if the Commission had awarded the contract to Minnesota Mutual, the award would have improved Minnesota Mutual's competitive posi-

tion and that because of the failure to award the contract to Minnesota Mutual "the plaintiff MILEY was deprived of compensation for servicing said contract and commissions and service fees for new business which would have resulted had said contract been awarded to MINNESOTA, to the amount, as MILEY says, in the sum of TWO HUNDRED AND EIGHTY THOUSAND DOLLARS ($280,000)" (A. 19).

The plaintiff did not claim damages resulting from the loss of a commission on the Massachusetts state employees' contract itself. Nor did the plaintiff allege any agreement which entitled him to service the contract or any part thereof for Minnesota. While he alleged that his gross income from servicing the Massachusetts contract and from new business which he might have obtained would have been $280,000, the plaintiff nowhere stated what lost profit he claimed to have suffered.

The defendants' motions to dismiss the complaint were allowed by the District Court (A. 33), and that order was affirmed *per curiam* by the Court of Appeals for the First Circuit (A. 36) upon the memorandum of decision issued by the District Judge (A. 28-33).

## Summary of Argument

The District Judge, in dismissing the complaint, stated six separate and independently sufficient grounds for his action (A. 28-33). They were:

> (1). That the conduct complained of was "done in the course of negotiation authorized and regulated by an applicable state law [Mass. G.L. c. 32A], and as to such transactions Congress has expressly provided [in the McCarran-Ferguson Act] that the Sherman Act shall not apply."

(2) That the transaction in question was also regulated by other laws of Massachusetts [G.L. c. 176D and 174A through 178] and therefore removed from the application of the Sherman Act.

(3) That on the facts alleged in the complaint it could not be said that in awarding the insurance contract as it did the Commission violated any rights of Minnesota Mutual; *a fortiori* it effected no rights of the plaintiff.

(4) That the injuries alleged in the complaint were too indirect to entitle him to bring this action.

(5) That the injuries alleged by the plaintiff were too speculative to support his action.

(6) That "the Sherman Act does not apply to the activities of a state or to the activities of its officers directed by the state legislature."

The plaintiff's petition for a writ of certiorari is devoted almost exclusively to the first two of these six grounds. Brief consideration is given to the fourth and sixth grounds, but nowhere in the petition does the plaintiff dispute the validity of the third and fifth grounds, namely, that no interference with legal rights of the plaintiff was alleged, and that the injuries alleged were too speculative to permit recovery.

The defendants do not for a moment concede that in deciding any of the issues which were considered in the petition, the Court of Appeals—which affirmed and adopted the District Judge's memorandum of decision (A. 36)—determined any question which should be decided by this Court or conflicted with any decision of this Court or of another court of appeals. However, even if it should be assumed, *arguendo*, that the application of the McCarran-

Ferguson Act in the particular situation is an important question which should be decided by this Court, it is still too clear to permit reasonable argument to the contrary that the other separate and independent grounds of the Court of Appeal's decision, which were considered either perfunctorily or not at all in the petition, present no such question and that each such ground would alone preclude a reversal of the Court of Appeal's decision. Accordingly, no determination which this Court might make with respect to the McCarran-Ferguson Act would have any effect upon the disposition of the case.

## Argument

I. The Complaint Failed to State Any Violation of the Sherman Act.

A. *The Sherman Act is Not Violated by Acts of a State Agency Duly Authorized by Statute.*

The Sherman Act is not violated by acts authorized and regulated by state statute. As this Court said in *Parker v. Brown*, 317 U.S. 341, 350-352:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

> "The state in adopting and enforcing the prorate [marketing] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as a sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. *Olsen* v. *Smith*, 195 U.S. 332, 344-45; cf. *Lowenstein* v. *Evans*, 69 F. 908, 910."

Similarly, the conduct of the Massachusetts State Employees' Group Insurance Commission seems clearly to be outside the scope of the Sherman Act as interpreted by the Supreme Court. The instructions to the Commission in Mass. G.L. c. 32A were clear. The Commission was directed to "negotiate . . . and purchase [group insurance] on such terms as it deemed to be in the best interest of the Commonwealth and its employees." The statute did not require the Commission to invite bids and accept the lowest one. Instead the Commission was instructed to "negotiate a contract" and, for that purpose and others, to "adopt such reasonable rules and regulations as may be necessary for the administration of this Act." As is stated in 10 McQuillin, *Municipal Corporations* § 29.73:

> ". . . Where bids are requested but there is no law requiring a competitive bid nor that the contract be awarded to the lowest bidder, . . . the contract need not be let to the lowest bidder."

Even where the public body is required by statute to publish an invitation for proposals, it is clear that there is no implied requirement that the lowest bid must be accepted. *Mayo* v. *County Commissioners of Hampden*, 141 Mass. 74, 6 N.E. 757 (1886). In that case, the Court said at page 75:

> "It is clearly the intention of the Legislature that the county commissioners, after inviting competition by public notice, shall have the authority to make such contracts as in their judgment the best interests of the county require."

The best interests of the public are not always served by considering price alone. Other "factors such as judgment, skill, ability, capacity and integrity" are also important. *Friend* v. *Lee*, 221 F.2d 96, 100 (D.C. cir. 1955).

The discretion of the public agency is particularly broad where, as in the present case, the agency is instructed to enter into a contract which it deems to be for the best interests of the community. *Interstate Power Co.* v. *Incorporated Town of McGregor*, 230 Iowa 42, 296 N.W. 770 (1941). As the Court said in *Slocum* v. *Medford*, 302 Mass. 251, 254, 18 N.E.2d 1013 (1939):

> "The court can interfere only where it is shown that the officer or officers charged with the duty of making the decision have acted corruptly or in bad faith or so unreasonably or arbitrarily as to be guilty of a plain abuse of discretion."

Reduced to its essentials the plaintiff's claim is that the defendant members of the State Employees' Group Insurance Commission undertook, through the process of inviting proposals, to determine the optimum insurance benefits which could be obtained for the state employees with the funds appropriated for that purpose and then, having settled on the benefits which could be obtained, went to the defendant Massachusetts life insurance companies writing group insurance and offered to award the state contract to them if they would supply the benefits for the available premium. There was nothing further in the complaint ex-

cept immaterial allegations intended to discredit the defendants and the bare allegation that the purpose of the defendants' cooperative efforts was "to eliminate Minnesota as a competitor and discourage it from continuing to solicit business in Massachusetts" (A. 14, 15).

Even accepting as true the allegations of the complaint, it is obvious that the course of action followed by the Commission, involving ultimately the cooperation of the defendant corporations, resulted inevitably in accomplishing the very purpose for which the Commission was constituted, namely, to negotiate the best possible group insurance contract for the state employees. By inviting proposals, the Commission learned the optimum coverage and premium rate which could be obtained. By persuading the Massachusetts companies to provide that coverage at that rate, the Commission assured the state employees of the availability of service facilities which clearly could not be matched by any single company and certainly could not be approached by a single foreign insurance corporation.

The plaintiff nowhere has denied that the coverage and premium rate under the contract negotiated by the Commission with Boston Mutual matched those provided in his own proposal. Nor, in fact, has he denied that the local service facilities of the combined domestic companies far surpass any which could be provided by Minnesota Mutual or any other foreign company.

It cannot be doubted that in using the low bid of Minnesota Mutual as a basis upon which to negotiate with the Massachusetts companies, the Commission was acting within the scope of the authority given it by Mass. G.L. c. 32 A. Accordingly, as the Supreme Court plainly stated in *Parker v. Brown*, 317 U.S. 341, 350-352, the conduct of the Commission was not governed by the Sherman Act and the plaintiff can maintain no action based thereon.

B. *The Acts Complained of Were Regulated by the Massachusetts Legislature and Therefore Under the McCarran-Ferguson Act Their Users Were Exempt from the Scope of the Sherman Act.*

The plaintiff makes it obvious in his petition that his case for certiorari is based almost exclusively on the assertion that the application of the McCarran-Ferguson Act to this action presents a novel and important question of federal law. As has already been pointed out, the decision of the courts below was based upon, and required by, other independent grounds, and it is strongly urged that this Court should deny the writ for that reason alone. However, a careful reading of the McCarran-Ferguson Act and of the decisions of this and other courts interpreting it, makes it clear that the application of the Act in the present action has presented neither a novel nor, indeed, a substantial question of law.

The McCarran-Ferguson Act (15 U.S.C. §§ 1011-15), enacted by Congress on March 9, 1945, is singularly clear and unambiguous.

It provides, in relevant part:

> "[§ 1011] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

> "[1012] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

"[ 1013. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914 known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof."

This Court's interpretation of the purpose of the McCarran-Ferguson Act was stated succinctly in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319:

"In the South-Eastern case [*United States v. South-Eastern Underwriters Association*, 322 U.S. 533] all the opinions had emphasized the historical fact that states had always been free to regulate insurance. The measure Congress passed shortly thereafter known as the McCarran Act was designed to *assure that existing state power to regulate insurance would continue.*" (Emphasis added)

Similarly, in *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408, this Court said of the Act at pages 429-431:

"Obviously Congress' purpose was broadly to give support to the *existing and future* state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects. Moreover in taking this action Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation: of the fact that they differ greatly in scope and character of the regulations imposed; . . .

"But, though Congress had no purpose to validate unconstitutional provisions of state laws . . . it clearly put the full weight of its power behind *existing and future* state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." (Emphasis added)

To the same effect are *American Universal Ins. Co. v. Sterling*, 203 F.2d 159 (3d cir. 1952); *North Little Rock Transp. Co. v. Casualty Reciprocal Exchange*, 181 F.2d 174 (8th cir. 1950), cert. den. 340 U.S. 823; *State v. Prudential Insurance Co.*, 223 Ind. 198; 64 N.E. 2d 150 (1945), aff'd without opinion 328 U.S. 823; *American Hospital & Life Insurance Co. v. Federal Trade Commission*, 243 F.2d 719, (5th cir. 1957); *National Casualty Co. v. Federal Trade*

*Commission*, 25 U.S. Law Week, (6th cir. June 6, 1957).

The plaintiff has attempted to graft onto the express terms of the McCarran-Ferguson Act a provision which is obviously the basic premise upon which his argument rests but which also is plainly unsupportable. That provision, in his own words, is as follows:

> "... they [the states] were required to act affirmatively and to give the public the same protection in the insurance field which the Sherman Act gives in every other field" (Pet. 20).
>
> "... In the absence of such legislation the business of insurance in these thirty-two states including Massachusetts, is subject to the provisions of the Sherman Act" (Pet. 23).
>
> "... The 'omnibus' clause in the Act [Mass. G.L. c. 176D, § 3] creating an administrative procedure cannot fill the void caused by the failure to enact legislation establishing compensatory, corrective or punitive machinery such as is provided by the Sherman and Clayton Acts."

The plaintiff's interpretation of the McCarran-Ferguson Act is clearly unsupportable.

1. The Plain Language of the Act.

The plaintiff argues in effect that unless a state has duplicated the Sherman and Clayton Acts by statutes of its own, the Sherman and Clayton Acts are applicable to insurance practices and transactions in that state. The answer to the argument is obvious. To adopt the plaintiff's interpretation would render nugatory the very clear and explicit intention of Congress that "the continued regula-

tion and taxation by the several states of the business of insurance is in the public interest. . . ." 15 U.S.C. 1011. Certainly no rational purpose would have been accomplished by exempting the business of insurance from the operation of federal regulatory laws only upon the condition that the states, to whom the responsibility of regulation was delegated, should adopt the same laws.

There is no ambiguity in the McCarran-Ferguson Act. After affirming the basic intent of Congress that the regulation of insurance is best left to the states, the Act provided an exception to the principle of exclusive state regulation. Congress specified that although for a period of almost three years the Sherman, Clayton and Federal Trade Commission Acts would not be applicable at all, after January 1, 1948 they would apply to the business of insurance "to the extent that such business is not regulated by state law." 15 U.S.C. 1012(b).

The Commonwealth of Massachusetts has availed itself of the opportunity afforded by Congress. It has enacted a comprehensive statutory scheme for the regulation of all phases of the insurance business (Mass. G.L. c. 174A through 178) and has provided in Mass. G.L. c. 32A *specific* directions and regulations governing the writing of the group insurance for state employees. Moreover, Mass. G.L. c. 176D is expressly designed to appropriate to the state government the regulatory function sanctioned by the McCarran-Ferguson Act. Chapter 176D states in Section 1 that:

> "The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, *all* such practices

in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined." (Emphasis added)

Section 4 of the chapter defines certain unfair or improper methods of competition in the business of insurance. In addition, Section 9 provides remedies:

"(a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this commonwealth in *any* method of competition or in *any* act or practice in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive. . . ." (Emphasis added)

These provisions, taken alone or in conjunction with Chapter 32A, clearly evidence an intention on the part of the Commonwealth of Massachusetts to regulate the conduct of negotiations leading to the writing of insurance contracts in general and of this insurance contract in particular. Accordingly, under the plain language of the McCarran-Ferguson Act, the Sherman Act is not applicable.

2. The Legislative History of the McCarran-Ferguson Act.

At pages 17-20 of his petition, the plaintiff has quoted at some length from the House Report (H.R. Rep. No. 143, 79th Cong., 1st Sess., p. 3) and the Senate Debates with respect to the McCarran-Ferguson Act. What he has quoted tends in no way to weaken or avoid the conclusion of the courts below that in enacting Mass. G.L. c. 32A the Mas-

sachusetts legislature was regulating the business of insurance and, accordingly, the defendants' negotiations pursuant to Chapter 32A were not subject to the Sherman Act. However, the plaintiff has omitted from the excerpts quoted in the petition a statement from Senator McCarran which leaves no doubt as to the matter:

> "Mr. Ellender. At the end of the three year period will the taxing and regulatory powers of the states be in any way effected should the Congress not take any action at all?
>
> "Mr. McCarran. No they will not be effected." (91 Cong. Rec. 1442 (1945)).

II. The Plaintiff Alleged No Injury to His Business or Property Which Would Support His Action.

A. *No Private Rights Were Infringed by Refusal of Minnesota Mutual's Bid.*

As has been pointed out above, nothing in Mass. G.L. c. 32A required the Commission to invite bids or, having invited them, to accept the lowest. However, even if one assumes that Minnesota Mutual's bid was the "lowest" submitted, and that the Commission was obligated by law to accept it, still the rejection of the bid resulted in no legally cognizable injury, either to Minnesota Mutual or to the plaintiff. The law recognizes no private right to the award of a government contract. As this Court said in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 126-128:

> "Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising. It was not enacted for the

protection of sellers and confers no enforceable rights upon prospective bidders.

". . . That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of *litigable rights upon those desirous of selling to the Government*; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain." (Emphasis added)

Accordingly, since no private rights were infringed by the rejection of Minnesota Mutual's bid, there was no legal *injury* to the "business or property" of the plaintiff and, therefore, no right of action under the Clayton Act. "Injury implies violation of a legal right." *Keough v. Chicago & Northwestern Ry.*, 260 U.S. 156, 163.

B. *The Injury To The Plaintiff, If Any, Is Too Indirect and Speculative to Permit Damages to Be Awarded In this Action.*

The only damages alleged by the plaintiff, a broker, were loss of an undetermined amount of service fees on this contract (not loss of a commission on the sale), and other gross income from possible new business of an unspecified amount, the total allegedly being $280,000 gross income (A. 19). No loss of net profit was alleged.

Nowhere in his complaint in the present case did the plaintiff allege that any of the acts of which he complained were done for the purpose of harming him. On the contrary, in attempting to invoke application of the Sherman

Act, he stated repeatedly that the sole purpose of the defendants was "to eliminate MINNESOTA as a competitor and discourage it from continuing to solicit business in Massachusetts" (A. 14, 15). (Emphasis added). If Miley suffered any injury as a result of the conduct which he claimed was directed at Minnesota Mutual, his injury was purely incidental and cannot form the basis of an action for treble damages.

In *Conference of Studio Unions v. Loew's Inc.*, 193 F.2d 51 (9th cir. 1951), it was held that the plaintiff labor unions and members thereof were not entitled to recover treble damages from the defendant motion picture studios who engaged in a conspiracy with a union which directly resulted in the discharge of the plaintiff employees but which had for its purpose elimination of certain other studios as competitors. The Court said at page 54:

> "The reasoning of the courts in the cases . . . is that the conspiracy to restrain competition was directed at the corporation and the damage suffered by the plaintiff was merely incidental. So, in the present case, insofar as the conspiracy was to restrain trade by destroying competitors it was directed at the Independents, and the alleged damage the appellants suffered therefrom was incidental to the accomplishment of the illegal object."

This rule has been developed in a series of cases which have held that shareholders and officers of corporations, creditors and landlords, and even individual partners in a partnership, have no standing to sue for treble damages. *Loeb v. Eastman Kodak Co.*, 183 Fed. 704 (3d cir. 1910); *Berli v. Silk Association of America*, 36 F.2d 959 (S.D. N.Y. 1929); *Corey v. Boston Ice Co.*, 207 Fed. 465 (D. Mass.

1913); *Westmoreland Asbestos Co. v. Johns Manville Corp.*, 30 F. Supp. 389 (S.D.N.Y. 1939) aff'd 113 F.2d 114.

The rule that no recovery may be had for remote injury, even if certain to flow from an injury directly caused, also has been held to bar recovery by the lessor of a theater on a percentage type lease where the lessee's business (and therefore the lease payments) were allegedly reduced by defendant's anti-trust violation. *Harrison v. Paramount Pictures*, 115 F. Supp. 342 (E.D. Pa. 1953) aff'd 211 F.2d 405, cert. den. 348 U.S. 828; *Melrose Realty Co., Inc. v. Loew's, Inc.*, 234 F.2d 518 (3d Cir. 1956) cert. den. 352 U.S. 890.

Even the owner of a patent licensed on a royalty-per-unit-sold basis cannot recover for sales which its licensee was allegedly prevented from making because of anti-trust violations. *Productive Inventions v. Trico Products Corp.*, 224 F.2d 678 (2nd cir. 1955) cert. den. 350 U.S. 936. The Court held that the injury to the plaintiff was too remote, stating at page 679:

> "Those harmed only incidentally by anti-trust violations have no standing to sue for treble damages; only those at whom the violation is directly aimed or who have been directly harmed may recover."

The speculative nature of Minnesota Mutual's injury was, of course, compounded in the case of Miley. He claimed lost service fees on the Massachusetts state employees' contract and lost commissions and service fees on new business which allegedly would have resulted if the contract had been awarded to Minnesota Mutual (A. 19). However, he did not allege that he was the exclusive or even a regular agent of Minnesota Mutual. Even if he were, neither the insured nor the insurer have a legal obligation to place the servicing of a policy with the original

broker in the absence of a contract to do so. See *Cronin* v. *National Shawmut Bank*, 306 Mass. 202, 27 N.E.2d 717 (1940). Thus, even if the plaintiff could establish an amount of interstate business which Minnesota Mutual allegedly lost as an incidental result of the awarding of this contract, he could not show that any particular part of it would have accrued to his account. It is this fact, among others, which clearly distinguishes the cases upon which the plaintiff based his claim that there is a conflict between the courts of appeal. In each of the cases upon which the plaintiff relied, there was a *contract* between the principal and agent, and the agent's claim of injury was predicated on and measured by his contract.

In summary, the plaintiff's claim to damages was based upon (a) an unspecified portion of the service commissions which he might have obtained from a company which might or might not have been awarded the particular contract, and (b) an indeterminable percentage which he might have negotiated of the new business which Minnesota Mutual might have obtained as a result of being awarded the state employees' contract. Both bases were extremely speculative. Accordingly, what Mr. Justice Brandeis said for this Court in *Keough* v. *Chicago & Northwestern Ry.*, 260 U.S. 156, 165 is equally appropriate here:

> "... damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us."

## Conclusion

Since this case presents no question to which a clear answer has not already been provided by Congress, this Court and the uniform decisions of the Courts of appeal, the petition for writ of certiorari should be denied.

Respectfully submitted,

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## Appendix

Sherman Anti-Trust Act, 15 U.S.C. §1 (1952)

> Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal: . . .

Clayton Act, 15 U.S.C. §15 (1952)

> Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The McCarran-Ferguson Act, 15 U.S.C. §§1011-1014 (1952)

> [§1011] Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> [§1012] (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, un-

less such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law:

[§1013] (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

[§1014] Nothing contained in this chapter shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

Massachusetts General Laws (Ter. Ed.) Chapter 32A, §§3, 4.

§3. State Employees' Group Insurance Commission; Members, Executive Secretary; Rules and

Regulations. — There shall be established within the commission on administration and finance, but not under its jurisdiction, a special unpaid commission, to be known as the state employees' group insurance commission, consisting of the commissioner of administration, the commissioner of insurance, and three members to be appointed by the governor, with the advice and consent of the council. At least one member appointed by the governor shall be a state employee, and not more than two appointive members of the commission shall be members of the same political party. No member appointed by the governor shall be an insurance agent, broker, employee or officer of any insurance company. Upon the expiration of the term of office of any appointive member, his successor shall be appointed in like manner for a term of three years. The commission shall be provided with suitable offices in the state house and may, subject to appropriation, incur expenses and appoint an executive secretary and such other employees as may be necessary to administer the provisions of this chapter. There shall be paid by the commonwealth to each appointive member of said commission the necessary expenses actually incurred in the discharge of his official duties. The executive secretary shall be the executive and administrative officer of the commission and shall not be subject to the provisions of chapter thirty-one. The commission shall adopt such reasonable rules and regulations as may be necessary for the administration of this act and shall make an annual report to the governor and to the general court which shall be in such form as to enable employees to understand the benefits available from the insurance program, including the cost thereof. (1955, 628, §1, approved Aug. 3, 1955; effective 90 days thereafter. Section 4 of the Act reads as follows:

Section 4. The three members initially appointed by the governor to the special unpaid commission established by section three of chapter thirty-two A of the General Laws, as appearing in section one, shall be appointed for terms of one, two and three years, respectively.)

§4. Insurance Policies, etc. — The commission shall negotiate with and purchase, on such terms as it deems to be in the best interest of the commonwealth and its employees, from one or more insurance companies, savings banks or non-profit hospital or medical service corporations, a policy or policies of group life and accidental death and dismemberment insurance covering persons in the service of the commonwealth, and group general or blanket insurance providing hospital, surgical and medical benefits covering persons in the service of the commonwealth and their dependents, and shall execute all agreements or contracts pertaining to said policies or any amendments thereto for and on behalf and in the name of the commonwealth. Said commission may negotiate a contract for such term not exceeding three years as it may, in its discretion, deem to be the most advantageous to the commonwealth; provided, however, that the portion of the cost of the premium per month to be borne by the commonwealth shall not exceed the estimated monthly cost for which funds have been appropriated by the general court for the then current fiscal year.

For the purposes of this chapter, any savings bank authorized to engage in the insurance business in accordance with chapter one hundred and seventy-eight and any non-profit hospital service corporation or non-profit medical corporation organized under chapter one hundred and seventy-six A or one hundred and seventy

six B shall be and is hereby authorized to enter into a reinsurance agreement as herein provided in the same manner as any other insurance company. (1955, 628, §1, approv. Aug. 3, 1955; effective 90 days thereafter.)

Massachusetts General Laws (Ter. Ed.) Chapter 176D, §§1, 2, 3, 5, 9, 12

§1. The purpose of this chapter is to regulate trade practices in the business of insurance in accordance with the intent of congress as expressed in the act of congress of March nine, nineteen hundred and forty-five (Public Law 15, 79th Congress), by defining, or providing for the determination of, all such practices in this commonwealth which constitute unfair methods of competition or unfair or deceptive acts or practices and by prohibiting the trade practices so defined or determined.

§2. When used in this chapter —

"Person" shall mean any individual, corporation, association, partnership, reciprocal exchange, inter-insurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance, including agents, brokers and adjusters.

"Commissioner" shall mean the commissioner of insurance.

§3. No person shall engage in this commonwealth in any trade practice which is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

§5. The commissioner shall have power to examine and investigate into the affairs of every person engaged

in the business of insurance in this commonwealth in order to determine whether such person has been or is engaged in any unfair method of competition or in any unfair or deceptive act or practice prohibited by section three.

§9. (a) Whenever the commissioner shall have reason to believe that any person engaged in the business of insurance is engaging in this commonwealth in any method of competition or in any act or practice in the conduct of such business which is not defined in section four, that such method of competition is unfair or that such act or practice is unfair or deceptive and that a proceeding by the commissioner in respect thereto would be to the interest of the public, he may issue and serve upon such person a statement of the charges in that respect and a notice of a hearing thereon to be held at a time and place fixed in the notice, which shall not be less than ten days after the date of the service thereof. Each such hearing shall be conducted in the same manner as the hearings provided for in section six. The commissioner shall, after such hearing, make a report in writing in which he shall state his findings as to the facts, and he shall serve a copy thereof upon such person.

(b) If such report charges a violation of this chapter and if such method of competition, act or practice has not been discontinued, the commissioner may, through the attorney general, at any time after thirty days after the service of such report cause a petition to be filed in the supreme judicial court to enjoin and restrain such person from engaging in such method, act or practice. The court shall have jurisdiction of the proceeding and shall have power to make and enter appropriate orders in connection therewith and to issue

such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public pendente lite.

(c) A transcript of the proceedings before the commissioner, including all evidence taken and the report and findings, shall be filed with such petition. If either party shall apply to the court for leave to adduce additional evidence and shall show, to the satisfaction of the court, that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commissioner the court may order such additional evidence to be taken before the commissioner and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commissioner may modify his findings of fact or make new findings by reason of the additional evidence so taken, and he shall file such modified or new findings with the return of such additional evidence.

(d) If the court finds that the method of competition complained of is unfair or that the act or practice complained of is unfair or deceptive, that the proceedings by the commissioner with respect thereto are to the interest of the public and that the findings of the commissioner are supported by the weight of the evidence, it shall issue its order enjoining and restraining the continuance of such method of competition, act or practice.

§12. The powers vested in the commissioner by this chapter shall be additional to any other powers to enforce any penalties, fines or forfeitures authorized by law with respect to the methods, acts and practices hereby declared to be unfair or deceptive.